

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



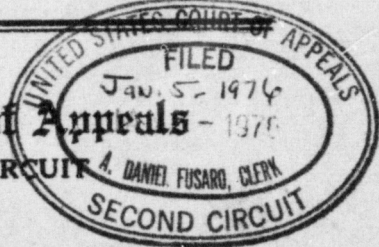
# 75-7430

To be argued by:

JAMES J. HAGAN

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**United States Court of Appeals - 1976**  
**FOR THE SECOND CIRCUIT**



RICHARD HUGHES,

*Plaintiff-Appellant,*

*against*

GENERAL MOTORS CORPORATION,

*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR DEFENDANT-APPELLEE**

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RICHARD HUGHES,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF FOR DEFENDANT-APPELLEE**

**Preliminary Statement**

Plaintiff-appellant, Richard Hughes, appeals to this Court from an order and judgment entered on July 15, 1975, which dismissed his action for personal injuries following a unanimous jury verdict rendered on May 28, 1975 in favor of the defendant-appellee General Motors Corporation ("General Motors" or "G.M."). The case was tried before District Judge Robert L. Carter, commencing on May 19, 1975 and lasting through May 28, 1975.

The action arose out of a vehicle fire on August 14, 1971, which destroyed a five-year old garbage truck in the town of Jersey City, New Jersey. Mr. Hughes, a passenger in the cab of the truck at the time of the fire, sustained serious burn injuries. The truck involved, a 1966 GMC Model V4005F, was owned by plaintiff's employer, the Public Works Department of the Town of Weehawken, and had

been in use as a garbage truck during the five-year period since its purchase in 1966. The truck was sold for scrap prior to commencement of this action, so that General Motors never had the opportunity to inspect it after the fire. After advancing various theories of liability throughout the course of pre-trial discovery, plaintiff finally claimed at trial that the fire had been caused by an allegedly defective fuel tank and filler neck assembly located in the cab of the truck.

### **Issues Presented**

1. Whether the District Court abused its discretion in denying appellant's pre-trial motion for an order compelling the deposition of the President of General Motors, in light of available alternative discovery methods of obtaining the information sought.

2. Whether the District Court erred in ruling that a statement of opinion made by an inventor in a patent application was not admissible in evidence.

3. Whether the District Court erred in excluding evidence of a subsequent design change relating to the placement of the fuel tank made some seven years after the manufacture of the accident vehicle, absent a showing that the placement of the fuel tank was a contributing factor to the accident and that the subsequent design change was made for reasons of safety.

4. Whether the District Court abused its discretion in ruling that vivid color photographs of appellant's burn injuries taken immediately after the accident were not admissible in evidence because their probative value was greatly outweighed by their potentially prejudicial impact on the jury.

5. Whether the District Court abused its discretion in excluding repetitive rebuttal testimony by plaintiff's expert witness.

6. Whether that portion of the Court's charge to the jury as to the relationship between proof of defective design and prevailing industry custom and usage was erroneous.

### Statement of the Case

Appellant correctly states in his brief that "[g]iven the state of the evidence before the jury there is no question but that a verdict for the defendant was the only logical one that they could have rendered." (Appellant's Brief at 10). In appealing to this Court, therefore, the appellant concedes that the jury's resolution of the issues in favor of General Motors is fully supported by the record. In point of fact, the case presented by appellant below was extremely weak. Appellant himself characterizes his evidence as "meager" (*Id.* at 11). The complaint barely escaped dismissal at the close of plaintiff's case in chief (T. 548).\*

Apparent throughout appellant's brief is a complete failure to recognize the essential elements of proof necessary to sustain his cause of action. Appellant still appears oblivious to the fact that recovery in this case required a showing that a manufacturing defect actually existed in the truck in question and that such defect caused the fire. This was the central fact of the case which remained wholly unproven. And none of the points raised in appellant's brief challenges this fact. The brief thus exhibits the same deficiencies as appellant's proof at trial, and seeks to avoid the essential facts of the accident, which were firmly established during the trial. These facts demonstrate why the Court below was entirely correct in making the rulings which are now attacked, and why the jury was correct in finding for the defendant. Since the proof in the record is

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\* References to portions of the trial transcript not reproduced in the joint appendix will be prefaced by "T." Reference to pages in the joint appendix will be prefaced by "J.A."

either ignored or minimized in appellant's brief, General Motors respectfully begs the Court's indulgence in setting forth in some detail a summary of the evidence.

### **The Facts**

The truck involved in the fire was one of two purchased by the Weehawken Public Works Department for use in refuse collection, snow removal, asphaltting, and other such activities throughout the Town of Weehawken. The truck was manufactured in two stages. General Motors assembled the underlying cab and chassis of the vehicle, a 1966 GMC medium duty truck. The cab and chassis were then shipped to a General Motors' dealer, McGuinness GMC Trucks, Inc., which installed a dump body on the chassis. This installation included modifying the basic cab by cutting two holes in the floor of the cab, into which were inserted levers for the operation of the dump body in the rear. The vehicle, as modified, was delivered to the Town of Weehawken in October of 1966. The Department of Public Works and a number of witnesses at the trial referred to the vehicle as "Truck No. 2". On August 14, 1971, after almost five years of extremely heavy use, Truck No. 2 caught fire.\*

### **Maintenance History of the Truck**

During its five-year life, the truck received very heavy use six and one-half days a week. As a result, the vehicle required frequent repair and maintenance. Because of rather haphazard maintenance by the Public Works Department, various breakdowns were not unusual. The plaintiff himself conceded that by the time of the accident in 1971 the truck was in an extremely deteriorated condition

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\* The exact mileage travelled by the truck during its life is not known. The odometer had ceased to function long before the accident and had not been repaired (T. 38; 93).

(T. 248-53; 258; 265-66), describing it in his deposition as "a piece of junk."

Plaintiff, however, asserted that proof relating to the prior maintenance history of the truck was irrelevant, and therefore offered no evidence at all on this issue during its direct case (T. 546).\*

At the close of plaintiff's case, there was an evidentiary gap of five years between the condition of the truck at the time of its manufacture and its deteriorated state at the time of the fire. Almost all of the evidence on this issue was introduced by General Motors on its direct case.

The evidence relating to the prior use and maintenance history of the truck reveals clearly why plaintiff was reluctant to treat the issue.

The Mayor of Weehawken, who at the time of the accident in 1971 was Commissioner of Public Works, acknowledged that, although the truck experienced "real heavy usage" (T. 584), there was no mechanic on the payroll (T. 555). Instead, the vehicle had to be sent to a local garage when it needed repairs (T. 555).

Daily log journals for the truck (Exs. M, N and O) reveal considerable wear and tear during the course of the truck's normal activities, which included picking up heavy refuse (T. 14; 581); plowing snow and salting streets in

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\* This failure of proof, in and by itself, requires affirmance of the judgment in favor of General Motors. As Judge Carter noted below (T. 548):

"If your argument is that it was a defective vehicle, that is, no matter what the propriety of the design, that this was a bad one of the lot, then I think that he [counsel for General Motors] is correct that what you have to do in that instance is to negate such elements as improper maintenance so that we can focus on that. I'm not sure you have done that."

See *Scanlon v. General Motors Corp.*, 65 N.J. 582, 326 A.2d 673 (1974).

winter (T. 581-82); and carrying asphalt for pothole patching (T. 582-83). During the five-year course of these activities the truck underwent numerous breakdowns and required frequent repairs. On one occasion the two left rear wheels fell off (T. 938). The clutch was replaced several times, apparently due to heavy use in snowplowing operations, or because of driver misuse (T. 602). "Reconditioned," rather than new, starters were installed when the original equipment wore out (T. 588-90; 599). The springs of the truck, suffering from heavy loads of salt and asphalt, had to be replaced. In May of 1971, the gas filter was replaced, an operation which required disconnecting the fuel line inside the engine compartment (T. 591-92). The transmission broke down and a "used" transmission was installed (T. 591). The truck would often fail to start (T. 258-59). A day or two before the fire the ignition system failed (Id.) and the battery terminals required cleaning (T. 594-95).

This independent evidence of heavy usage and a resulting deteriorating condition was amplified by the testimony of the crew of Truck No. 2. Charles Brennan, the driver, acknowledged that the odometer hadn't worked for a long time (T. 93). He also said that the door handles occasionally broke off and that a nail was used to make them work (T. 91). At the same time, however, he testified that prior to the accident the gas tank had never leaked (T. 77; 81).

Henry Ollert, the "stacker" on the crew, testified that the right hand door could not be opened from the inside because there was no handle, and that the right hand window was permanently shut, because it too lacked a handle (T. 24; 44-45). He also said the seat cushions were busted and the stuffing was sticking out (T. 49).

The plaintiff, Mr. Hughes, went into more detail. He said the seats were falling apart; the coil springs were protruding; the right door had no handles; the floor mats

were worn and an old rug was needed; the buttons on the heater were broken and pliers were needed to operate it; the emergency brake did not work; the interior of the cab was badly deteriorated; and that drafts came through holes in the cab (T. 248-53; 265-66). As mentioned above, he described the truck as "a piece of junk" (T. 248).

There was also evidence that the vehicle had been in at least one accident, which required that the right door be welded back into place (T. 45-46). The vehicle was often towed to a local garage after its various malfunctions, which may have caused damage to the engine hood (J.A. 369).

As noted above, despite the checkered service history of this truck, there was not the slightest indication during the five years of any difficulty with the fuel tank or filler neck assembly of the vehicle.

### **The Accident**

On August 13, 1971, the truck had broken down on the road with an ignition problem. After being towed into the local garage, the battery terminals were cleaned (T. 593-95).

On August 14, 1971, having picked up a full load of heavy refuse, Brennan, Hughes and Ollert were on their way to the dump. The truck was back in service and left the garage at approximately 8 A.M.. At about 10 A.M., Brennan, the driver, noticed he was running out of gas (T. 68; 81). They stopped at a service station and purchased about two dollars worth of gasoline (J.A. 115; 122; 145-46). When Brennan turned the ignition switch to restart the engine, the truck erupted into flames (Id). All three of the men jumped out of the truck. Brennan and Ollert received minor injuries (J.A. 115; 123). Appellant Hughes, who had been seated in the middle of the cab, straddling the levers for the dump mechanism, was seriously burned (J.A. 146-51). After the accident the truck was towed to the Public Works Department garage, where it remained until March of 1972, when it was junked (T. 554).

### **Plaintiff's Theories of Liability**

During the pre-trial discovery stage, plaintiff jumped from one theory to another in his effort to establish the liability of General Motors for the fire. Well-established principles of Workmen's Compensation Law, of course, prohibited an action by Mr. Hughes against his employer, the Town of Weehawken.\* Appellant acknowledges that initially he claimed there were various design defects in the *engine*, as opposed to the cab of the truck (Appellant's Brief at 49). While these claims were abandoned at trial, this fluctuation in theories is important in light of appellant's argument that he was unduly restricted in pursuing his discovery rights.

#### **A. The Complaint**

In May of 1972, two months after the Public Works Department had junked the truck, plaintiff commenced this action, alleging that the fire had been caused by a "replacement ignition device" manufactured by General Motors and installed the day before the accident (J.A. 6-7). It was also claimed that the position of the gasoline tank in the cab of the truck behind the passenger seat constituted a hazardous design (J.A. 7).

#### **B. Plaintiff's First Set of Answers To General Motors' Interrogatories**

In April 1973, in answers to interrogatories, plaintiff claimed that "the *engine* functioned in such a way as to ignite gasoline fumes" (J.A. 14) (Emphasis added). It was claimed that the engine area was defectively designed in that the upright spark plugs created receptacles for

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\* The Town has paid all of Hughes' medical bills, and has kept him on full salary to date (J.A. 525).

gasoline which might leak from the fuel line, and that the firewall was not designed to limit effectively the spread of fire from the engine to the cab (J.A. 14-15). Plaintiff specified the cause of the fire as a leak in the gas line in the engine compartment, which filled the spark plug receptacles with gasoline, the fumes of which were then ignited by the spark plugs (J.A. 15).

### **C. Plaintiff's Updated Answers to General Motors' Interrogatories**

On May 8, 1975, on the eve of trial, plaintiff completely changed his theory of the case. He revised his answers to the interrogatories and, for the first time, alleged that the "filler tube assembly" of the gas tank\* was leaking at the time of the fire, allegedly because the joints of the filler neck had deformed, permitting gasoline fumes to escape into the cab (J.A. 96). For the first time, it was claimed that General Motors had actual notice of the "general vulnerability" of its design of the filler tube assembly by virtue of a 1957 patent granted to one Edward N. Cole (then a staff engineer at General Motors, later to become president of the company) (J.A. 96). The design was hazardous, it was claimed, because the filler tube assembly was inside the cab (J.A. 97). At the same time, having completely changed his theory of liability, plaintiff professed to no longer know the source of ignition for the fire (J.A. 97). Plaintiff's position was that a "flash fire due to the presence of gasoline vapors in the cab of a truck is evidence of a defect" (J.A. 97).

It is thus clear that plaintiff originally based his case upon the theory of a design defect in the engine, which ignited a fire which spread to the cab. This theory was

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\* The filler tube assembly, or "filler neck", is a flexible conduit clamped to the neck of the fuel tank and leading to an aperture outside the cab covered by the gas cap. Gasoline is pumped into the fuel tank through this assembly.

abandoned just prior to trial for one which hypothesized, wholly out of thin air, a leaking filler tube assembly that supposedly allowed vapors to escape into the cab, which were then ignited by some unknown source. At trial, therefore, it became necessary for plaintiff to prove that the filler tube had in fact leaked, and that there actually were vapors in the cab which had been ignited. Plaintiff proved neither point. The evidence was overwhelmingly to the contrary.

General Motors presented evidence during its direct case demonstrating that the fire began in the engine, not the cab, and was most likely due to a leak at the fuel line near the carburetor. The resulting gasoline vapors were then ignited by a spark from the distributor, and the flames spread to the cab through the holes in the floor provided for the dump mechanism levers. All of the evidence at trial strongly supported this explanation of the accident, and demonstrated clearly that the placement of the fuel tank and the design of the filler neck assembly had nothing to do with the fire.

### **Testimony of The Crew**

All three members of the work crew of Truck No. 2 testified on plaintiff's case in chief. All three agreed on one major point—none of them smelled any odor of gasoline in the cab immediately before the fire (J.A. 119, 124; 127-28; 160) \* This fact, as later explained by expert testimony, was one of the strongest items of evidence negating the theory that gasoline vapors were present inside the cab. Other portions of their testimony, as set forth below, were equally damaging to plaintiff's case.

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\* Although Hughes attempted to deny this fact at trial, he had made this admission in his deposition and did not change that testimony when he executed the deposition (J.A. 160).

**(A) Charles Brennan**

Mr. Brennan, the driver, testified that when he started out in the morning at approximately 8 A.M. he checked the gas gauge and saw that he had enough fuel for the rest of the day (T. 81). On the way to the dump, however, at about 10 o'clock, he was surprised to note that the gas gauge was dropping rapidly (T. 68; 78; 81; J.A. 133). At this point he had driven no more than six miles (T. 68-69; 79). Since this was the only time in five years that he had needed to stop for gas while on his route (T. 80), he concluded that gas must have been leaking somewhere (J.A. 132). When he stopped at the service station, he ordered two dollars worth of gasoline, figuring that would be enough for him to complete his trip (J.A. 122). He smelled nothing unusual (J.A. 124). When he turned the ignition switch to restart the engine, the first thing he saw was flames in front of him *on the outside of the windshield glass* (J.A. 123; 129-30). The flames then came into and engulfed the cab (J.A. 130-31).

**(B) Henry Ollert**

Mr. Ollert agreed that this was the first time they had ever stopped for gas during the three years he had been assigned to the truck (T. 41). He also acknowledged that he had never smelled gas fumes in the cab, either on the day of the accident or at any prior time (J.A. 117-18; 119). When Brennan turned the ignition switch, Ollert heard a sound like a firecracker going off, and then saw fire coming up from under the dashboard (J.A. 117). He punched out his window on the right side, reached outside to open the door and managed to escape with only minor burns to his hand and a part of his face (J.A. 115).

**(C) Richard Hughes**

Appellant Hughes had been sitting in the middle of the cab, straddling the two levers directly above the holes in the floor (J.A. 146-49). He said the cab blew up in flames (J.A. 146). He threw his hands up to his face and tried to get out (J.A. 150). Ollert had inexplicably closed the door on the right side after his escape, so Hughes had to lean over and reach outside the window to get to the handle (J.A. 150-51). He received serious burns, primarily on his left side and ear and on his right hand (J.A. 154).

**Testimony of Investigating Officials****(A) Raymond Price**

Battalion Chief Raymond Price of the Jersey City Fire Department arrived at the scene of the fire around 10:15 A.M. and testified at trial that in his opinion the fire had started from gasoline vapors in the cab of the truck, basing this conclusion on his observation of heavy burn and charring damage in the cab (T. 124-26). However, on cross-examination, he admitted that he had never looked under the hood (presumably because it was too hot) and therefore did not know what damage had been done to the engine (T. 128-29). He also testified that he was never able to determine the source of either the vapors or the ignition (T. 136). Moreover, he admitted that if there had been a combustible concentration of gasoline fumes in the cab, the occupants would have been able to smell them (T. 133).

**(B) Richard Lennon**

Deputy Chief Richard F. Lennon of the Weehawken Fire Department inspected the truck at the Public Works garage several days after the fire (T. 154-55). He was the only

witness who examined the engine compartment after the fire. At trial he described the engine as having gone through a "terrible disintegration" and testified that the distributor, carburetor and fuel lines in the engine compartment were "melted" (T. 166-67; 170), whereas the fuel line inside the cab was still intact (T. 175). The Fire Department report based on his investigation stated that it was not possible to determine the source of ignition of the fire, or whether it had started in the engine compartment or the cab. It noted that the "possible cause" of the fire was the accumulation of vapors "either from the motor or the gas tank." Finally, the report pointed out that no smell of gas fumes had been detected by the men in the cab at the time (Ex. C, J.A. 572).

#### **Appellant's Expert Witness Alvin S. Weinstein**

Appellant's theory at trial was that the design of the fuel tank and filler neck assembly "encouraged the accumulation of a combustible level of gasoline vapors within the passenger cab" (Appellant's Brief at 3). Plaintiff sought to establish this theory through the testimony of one Alvin S. Weinstein, a professor of mechanical engineering at Carnegie Mellon University, who had been retained by plaintiff some three years after the accident and, of course, had never seen the accident vehicle (J.A. 187-88). He had not even formed his opinion as to the cause of the accident until May 5, 1975, two weeks before trial (J.A. 307-08).

Professor Weinstein was quite inexperienced in the investigation of vehicular fires, having inspected only three such burned vehicles in the past—one truck, one car and one go-cart (J.A. 185). His knowledge of the flammability characteristics of gasoline was almost nonexistent, as the following testimony reveals (J.A. 252; 255-56):

"Q. Now, do you have any knowledge of how heavy the concentration must be before you can smell gasoline?

"A. No, I do not.

"Q. Do you have any opinion as to how many parts out of the million would have to be present in the air to smell gasoline?

"A. No, I do not.

"Q. Would you have any opinion as to the severity of the smell or odor of gas vapor once you reached the 14,000 parts per million area?

"A. I don't know how to measure severity of odor. No, I do not.

\* \* \*

"Q. Have you ever done any experiments, Doctor, with gasoline to determine the relationship between the ignition factor of the vapor and the strength of the smell?

"A. No, I have not.

"Q. Have you read any studies in that area?

"A. Not on the olfactory factors involved in follicle mixtures, no, I have not.

\* \* \*

"Q. Now, Doctor, do you believe if you had some gasoline, the vapors were rising from the gasoline, you would be able as an expert in this field to demonstrate to his Honor and the jury simply by pointing with your finger the area where the vapors are rising from the gasoline and where, if one ignited it, you'd get the flame; do you believe you would be able to do that approximately?

"A. No, I do not."

In fact, Professor Weinstein could not even recognize the smell of gasoline (J.A. 258-59):

"Q. I would like to explore that. Are you saying that you cannot tell from your sense of smell that

Defendant's Exhibit H is definitely gasoline; is that your testimony?

"A. Yes, that is my testimony."\*

His testimony was tentative, speculative and, at times, quite confusing. It was his opinion that the probable source of vapors, which he *assumed* were in the cab, was the fuel tank and filler neck, and he suggested the possibility of rusting, punctures, or loose connections (J.A. 215). but of course never offered any evidence to show that any of these possibilities actually occurred. His opinion as to the alleged design defect was that the location of the tank in the cab was unreasonably dangerous (J.A. 220).

Weinstein finally admitted that gasoline vapors of a combustible concentration would emit a strong pungent odor (J.A. 252). He also conceded his awareness that all three passengers had testified that they had not smelled any gasoline vapor in the cab just prior to the fire (J.A. 256; 294). He tried to avoid the obvious conclusion to be drawn from this evidence by testifying that, although the passengers would have smelled the fumes he assumed were in the cab, they might not be "aware" of them (J.A. 293-94). This novel concept was never explained by Professor Weinstein.

Weinstein was not aware prior to the trial that the fuel line inside the engine compartment was melted after the fire, whereas the fuel line in the cab was not (J.A. 283-84). Furthermore, in formulating his opinion as to the cause of the fire, he had not seen the only photograph of the engine compartment taken after the fire, which revealed the melted fuel line, carburetor and distributor cap (Ex. B, J.A. 287).

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\* Defendant's Exhibit H was a small vial of gasoline. During the course of the Weinstein cross-examination, it was offered to plaintiff's expert and he was asked to identify it as gasoline. He was unable to do so.

When confronted with these matters, Professor Weinstein wavered and speculated that there may have been *two* fires—one in the cab and one in the engine:

"I don't know which fire started first. I'm reasonably certain there were two fires, one in the engine compartment, one in the cab, as I testified to yesterday.

Now, I'm not certain whether the fire in the engine compartment might have caused some particles, hot particles to come into the cab and ignite the flammable vapors in the cab, or it was the reverse, whether the fire started in the cab, sent some vapors through the tiny holes and started a fire in the engine. I'm not certain which one it was." (J.A. 310-11).

At the close of plaintiff's case, nothing had been proven except that there had been a fire in the truck, and that the fuel tank was located in the cab. There was no proof of a defect in the fuel tank or the filler neck, or of the leakage of any gas fumes into the cab. No attempt had been made by plaintiff to exclude other possible causes of the fire, such as improper maintenance or simple wear and tear on various engine parts.

#### **General Motors' Case**

General Motors' main witness was Mr. Ronald E. Elwell, a staff engineer in General Motors' engineering analysis department, specializing in fuel systems and vehicle fire analysis (T. 609-10). Mr. Elwell testified that in 1949 General Motors began placing the fuel tank within the cab of its trucks and continued to do so beyond 1966, the year Truck No. 2 was manufactured (T. 611). The design decision in 1949 was occasioned by World War II experience in off-road operation, which showed that placement of the tank outside the cab of the truck exposed it to damage of various kinds (J.A. 323). By placing the tank inside the

cab it was far more protected from damage (J.A. 324-25), and by protecting the fuel tank the passengers were also protected (J.A. 384).

Elwell testified that in 1966 all of the major truck manufacturers placed the fuel tank within the cab of their light and medium duty trucks, and that this was a safe design in accordance with the state of the art in 1966 (J.A. 325-27).\*

In Mr. Elwell's opinion, based on his review of the testimony of the passengers, the investigation reports, and the post-accident photographs, the fire was caused by leakage of gasoline in the engine area, which was ignited by a spark from the distributor when Mr. Brennan attempted to start the vehicle (J.A. 328). The fire came into the cab through the holes in the floor (J.A. 338). He explained that since all fires move "up and out," and since there was fire damage underneath the floor of the cab as well as in the engine compartment, the fire could not have started in the cab (J.A. 350). Moreover, there could not have been a combustible level of vapors in the cab, because such a mixture would have caused an overwhelming and unmistakable pungent odor (J.A. 339), which everyone agreed did not exist. He pointed out that the photograph of the engine (Ex. B, J.A. 571) showed melting of the carburetor and disintegration of the distributor, yet other photographs showed only minor damage to the exterior of the fuel tank inside the cab (J.A. 329-31, 352-53). He noted that Brennan first saw flames *outside* the cab (J.A. 366). All of these factors convinced Mr. Elwell that the location of the fuel tank and filler neck assembly had absolutely nothing to do with this fire (J.A. 375).

As Mr. Elwell reconstructed the accident, Truck No. 2 had leaked a substantial amount of gasoline into the engine

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\* Professor Weinstein failed to demonstrate any knowledge of the state of the art in the automotive industry regarding the placement of fuel tanks in trucks in 1966 (T. 376; 409-11).

compartment by the time it got to the service station. However, as long as the engine was running, the fan operated to blow the vapors out of the engine and away from the truck (T. 798-802). When the engine was turned off in the service station, the fan no longer operated and the engine heated up somewhat (Id.). Since the engine was tilted very slightly towards the passenger compartment, the vapors, being heavier than air, tended to accumulate in and near the distributor and underneath the floor of the cab (T. 798).

When Brennan tried to start the vehicle, a spark from the distributor ignited the fumes and caused the firecracker "pop" which Ollert heard (T. 799). Brennan saw flames in front of the windshield, which came out through a dented opening in the hood (Id.). The flames rushed through the lever holes which Hughes was straddling, thereby accounting in part for the severity of his injuries, as compared to those of the other two passengers.

Elwell's explanation of the fire, although clearly not conclusive on the subject, was obviously convincing. He accounted for all of the known physical facts, and did so without speculation of the kind indulged in by Professor Weinstein. The jury returned a unanimous verdict for General Motors in one hour.

### **The Governing Law**

The substantive law of the State of New Jersey was applicable in determining the issue of liability at trial. With respect to strict liability in tort, which was plaintiff's main theory, the *quantum* of proof required to prevail is governed by the principles established in the recent decision of *Scanlon v. General Motors Corp.*, 65 N.J. 582, 326 A.2d 673 (1974). The *Scanlon* case declared the following to be the essential elements which a plaintiff must prove by a preponderance of the evidence:

- (1) that the product in question was defective, that is, not fit for the ordinary purposes for which such products are sold and used;

(2) that the defect arose while the product was in the control of the manufacturer; and

(3) that the defect was the proximate cause of plaintiff's injuries.

Appellant failed to prove any of these elements.

The bulk of the *Scanlon* opinion was devoted to a thoughtful analysis of what the Court considered the most difficult of these three elements for a plaintiff to establish: proof that the claimed defect existed when the product left the manufacturer's hands. The Court commented at length on the relevance of the product's age, condition, and prior maintenance history, factors which have an obvious impact on the present case. The Court stated:

"Generally speaking, the older a product is, the more difficult it is to prove that a defect existed while in the control of the manufacturer. No product is intended to last indefinitely and many products require care and maintenance to perform at the same level as they did when new. With many products proof that the defect arose while in the hands of the manufacturer becomes very difficult, if not impossible, after a certain age. . . ." 326 A.2d at 678-79.

Further:

"A motor vehicle is not a simple uncomplicated instrumentality. Its parts require periodic maintenance, minor adjustments and occasional major repairs or replacements. A nine month old station wagon with 4000 miles on it is not the kind of product as to which human experience tells us an accident such as the one in question does not generally occur in the absence of a defect existing in the hands of the manufacturer." 326 A.2d at 682.

Common experience would indicate even less likelihood of an accident being the result of a manufacturer's defect in a five-year old truck having the background of this accident vehicle.

## POINT I

### **The Lower Court Properly Denied Plaintiff's Pre-Trial Motion to Depose the President of General Motors.**

Appellant claims that he was prejudiced by a ruling made by Judge Carter during the discovery stage of this litigation. It is argued that plaintiff should have been permitted to depose Edward N. Cole, then president of General Motors, and that the court's denial of this one item of discovery so prejudiced his case as to warrant reversal.

It is claimed that Mr. Cole occupied a "singularly excellent position . . . regarding the possession of highly probative factual information relative to the triable issues in this litigation" (Appellant's Brief at 13), and it is implied that Mr. Cole was the only person in the General Motors' organization capable of supplying information concerning "the quality control aspects of fuel tank and filler neck assembly operations" (Id.). Both claims are baseless, and Judge Carter's denial of the motion was a perfectly proper exercise of his discretion to control the course of pre-trial discovery.

Judge Carter's opinion read as follows (J.A. 92):

"No good cause exists to require defendant to submit its president for a deposition when it is clear that *the information plaintiff wants is available through other employees of defendant, and such employees have been questioned or on plaintiff's request can be questioned.* The request borders on harassment and would at best result in a duplication of testimony." (Emphasis added).

It must be remembered that when plaintiff sought to depose Mr. Cole in March of 1974, two depositions of General Motors' representatives had already been completed.

The first witness was Mr. Perry Dooley, a General Motors staff engineer. The second witness was Mr. John Hubbard, also a staff and fuel system design engineer. Plaintiff's counsel asked both these witnesses numerous questions concerning the design, placement, manufacture and operation of various elements of the fuel system.

Appellant then sought to engage in discovery relating to quality control procedures in 1966. He brought on a motion to depose Mr. Cole, the president of G.M., on the ground that Mr. Cole co-authored a patent in 1957. General Motors opposed, pointing out that other witnesses were available and offering to produce such a witness in Detroit (J.A. 69). On the above record, Judge Carter quite properly denied the motion to examine Mr. Cole.

It should suffice to note that plaintiff never followed up on the offer of another witness. Moreover, plaintiff never sought to obtain such information by interrogatory or any other discovery device. No attempt was made to subpoena Mr. Cole, who was then no longer president of G.M., during the trial. Indeed, plaintiff never even raised the issue of quality control procedures at trial, choosing to rely mainly on a strict liability theory. Plaintiff never asked that Mr. Cole be deposed concerning his patent. The belated claim of prejudice is unsupportable.

The two cases relied upon by appellant are wholly inapplicable here. *Colonial Capital Co. v. General Motors Corp.*, 29 F.R.D. 514 (D. Conn. 1961), involved a motion by G.M. to have its chief executive officer answer interrogatories rather than submit to an oral deposition, which motion was granted by the court. And in *Buryan v. Max Factor & Co.*, 41 F.R.D. 330 (S.D.N.Y. 1967), the only issue was where the depositions should be held.

In the present case, Judge Carter obviously properly exercised his discretion on discovery matters. *General*

*Houses, Inc. v. Marloch Mfg. Corp.*, 239 F.2d 510, 514 (2d Cir. 1956); *New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp.*, 24 F.R.D. 186, 190 (S.D.N.Y. 1959).

## POINT II

### **The Trial Court Quite Properly Excluded the Opinion Asserted by Mr. Cole in his Patent Application**

In 1957, Mr. Cole (then a staff engineer at General Motors), and a co-inventor applied for a patent relating to a filler neck design different from that in use nine years later when Truck No. 2 was manufactured. In the patent application, the two inventors argued that their filler neck design was superior to the design then in general use, asserting with respect to such latter design that assembly line problems sometimes occurred, and that "leakages *may occur* at either or both of the two joints necessarily formed. . . ." (Emphasis added) (J.A. 560).

Appellant maintains that this statement from the 1957 patent application should have been admitted in evidence as proof that Truck No. 2 manufactured in 1966 contained a defective fuel system (Appellant's Brief at 16; 19-20), and repeats his argument made at trial that admission in evidence of the patent was justifiable in order to permit the jury to infer that the subject design *in fact* allowed gasoline vapors to enter the cab (J.A. 204-206).

But the Court's ruling quite properly responded to such an assertion (J.A. 206):

"You can't now talk about some other design [the Cole patent] without establishing this design [that used on Truck No. 2] was defective. The fact that they could have used this other patent does not establish that this [design] was defective."

It is obvious that the gratuitous statement made by an inventor in 1957 to the effect that he believed he had

designed a better product is no proof that the design used in Truck No. 2 in 1966 was defective. Bald assertions of improved design, devoid of factual data, have no evidentiary value. *Western Assurance Co. v. J. H. Mohlman Co.*, 82 F. 811, 821 (2d Cir.), *cert. denied*, 168 U.S. 710 (1897); *Garst v. General Motors Corp.*, 207 Kan. 2, 484 P.2d 47 (1971).

In his challenge to Judge Carter's ruling, plaintiff cites two New Jersey cases as allegedly supporting his contention that a patent application is evidence permitting an inference of a dangerous condition in an unrelated design. *Jakubowski v. Minnesota Mining and Manufacturing*, 42 N.J. 177, 199 A.2d 826 (1964), involved a worker at an automotive plant who was injured when a disc manufactured by defendant fractured. The Court there held (199 A.2d at 829):

"Plaintiff must establish by some proof that weighs heavier than mere surmise or conjecture that his injury resulted from an unreasonably dangerous condition of the disc for which defendant is responsible."

The Court held that plaintiff had not proven either negligence or breach of warranty because he had failed to exclude other possible causes for his injury, and therefore had not shown that the fracture of the disc was attributable to the manufacturer. *Id.* The Court observed that in certain situations circumstantial evidence permitting an inference that a dangerous condition existed prior to sale was admissible, but never intimated or suggested that evidence such as an inventor's statement in a patent application would qualify. 199 A.2d at 830.

Likewise, in *Scanlon v. General Motors Corp.*, 326 A.2d 673, 677 (1974), the Court held:

"However, additional circumstantial evidence, such as proof of proper use, handling or operation of the

product and the nature of the malfunction, may be enough to satisfy the requirement that something was wrong with it."

In *Scanlon*, as here, the plaintiff introduced no evidence that a dangerous condition had existed prior to sale. 326 A.2d at 682. "Specifically, he failed to establish that the defective condition was not the result of faulty maintenance." *Id.* Nowhere in the *Scanlon* opinion can one find support for the admission in evidence of the patent application here involved. *Garst v. General Motors Corp.*, 207 Kan. 2, 484 P.2d 47 (1971), is to the same effect, holding that there must be competent proof of a *defect in the design in question*, and not merely proof that a better design might have been conceived. 484 P.2d at 61.

Appellant next argues that the statement in the Cole patent application was admissible in corroboration of Weinstein's testimony (Brief at 20), relying on cases which have permitted experts to refer to various reports prepared by government agencies or institutions supported by government grants. None of these cases, however, even remotely supports the admissibility of opinions asserted in a patent application.

*Western Assurance Co. v. J. H. Mohlman Co.*, 83 F. 811, 821 (2d Cir.), *cert. denied*, 168 U.S. 710 (1897), permitted the use of a U. S. Department of Agriculture report concerning test results on the crushing strength of timber. The report was a recognized authority in the civil engineering profession. The precise holding of the Court was as follows (83 F. at 821-22):

"... where the scientific work containing them is *concededly recognized as a standard authority by the profession*, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, *when such statistics and tabulations are generally relied upon by experts in the particular*

*field of the mechanic arts with which such statistics and tabulations are concerned."* (Emphasis added)

Cases such as *Bair v. American Motors Corp.*, 473 F.2d 740 (3d Cir. 1973), and *Weaver v. Ford Motor Co.*, 382 F. Supp. 1068 (E.D. Pa. 1974), are equally inapplicable since they too involved statistical tabulations or factual results prepared by government agencies.

The Cole patent application clearly does not reach the level of reliability of such reports. The statement in question was a mere opinion, self-serving and "puffing" in nature. There were no facts or test results submitted in support of it. There was no basis for its admission in evidence as corroborative of anything.

Appellant's final contention was that the statement in the Cole patent application was admissible as proof that G.M. knew or should have known that the design of its fuel tank and filler neck assembly was defective. But it is clear that the Cole statement falls far short of proof of such knowledge, and indeed Mr. Elwell testified at trial that there were in fact no prior complaints about leakages or other such defects in the system (J.A. 410; 412).

There simply was no basis for the admission in evidence of the Cole application for any of the purposes suggested by appellant. Plaintiff never seemed to understand, as the Court repeatedly pointed out, that the bare unsupported statement in the application was hearsay of the rankest sort. On the basis of plaintiff's total failure to lay any proper foundation whatever, Judge Carter stated (J.A. 416-17):

"You haven't made any basis for admitting that at all. You haven't even approached the point that I could possibly admit that before the jury. If that's all you are going to do, then I'll call the jury back and the matter will be excluded.

It is on the record. You haven't made any possible basis that I can see to demonstrate that that is a matter that goes before the jury or that General Motors had any notice that this design was defective in the respects that you are attempting to show.

Mr. Elkind: Your Honor, it appears on the face of the exhibit.

The Court: We had this discussion before, in which you indicated to me that Mr. Cole, whose position we don't know, who was co-author of or co-inventor of a patent and in that patent he and his co-inventor indicate that their patent is a superior product for various reasons—what you are attempting to do is to impute that as being notice and knowledge to General Motors, and I don't believe you can do that.

The fact that the statement is made there doesn't show that it is so. It could be puffing. There is no showing of what tests were made on these products to demonstrate that this was or was not so. There is no evidence that you've introduced to show other than the statement, I think about a sentence or so of Professor Weinstein, that where this tank was located was in a dangerous position. I don't believe that you've shown me anything that would justify my admitting that."

Tacitly acknowledging the validity of this ruling, appellant now insists that the patent application was admissible on the issue of prior notice without the need for such a foundation, because it was a "document issued by the Federal government" (Appellant's Brief at 24). In this connection, appellant relies on *Wright v. Carter Products, Inc.*, 244 F.2d 53 (2d Cir. 1957). That case involved a claim for personal injuries resulting from an allergic reaction to aluminum sulfate in "Arrid" deodorant. Evidence was introduced showing that defendant had received hundreds of complaints prior to the date of sale to plaintiff. The FTC had made factual findings that use of Arrid will cause

dermatitis in some people. This Court held these findings should have been admitted at trial solely on the issue of notice of potential harm. Since the proffered evidence involved facts, not opinions, the decision was obviously correct. The same principle was applied in both *Webb v. Fuller Brush Company*, 378 F.2d 500 (3d Cir. 1967), and *Braun v. Roux Distributing Co.*, 312 S.W.2d 758 (Mo. 1958), also cited by appellant.

It is significant to note that appellant fails to cite a single case in which inventors' opinions contained in a patent application, without any further foundation, were admitted in evidence for any of the reasons advanced by him, i.e., proof of defect, shoring up of his expert, or notice of danger. The statement in question had no evidentiary value whatever, no proper foundation was ever laid for its admission in evidence, and the lower Court was quite correct in excluding it.

### POINT III

#### **The Trial Court Properly Excluded Evidence Relating to A Design Change in the Fuel System Implemented Seven Years After Manufacture of the Subject Vehicle**

Just prior to trial, plaintiff served upon G.M. a Request to Admit, seeking an admission from the company that it no longer placed the fuel tank inside the cab on vehicles of the class of Truck No. 2. G.M. conceded this to be the case. Thereafter, plaintiff never sought to pursue discovery relating to the reasons for such change, and never inquired into the matter at trial.

Plaintiff unsuccessfully sought to read this "admission" into evidence during the trial (J.A. 222), without laying any foundation as to why such change in fuel tank placement had occurred. He now maintains in his brief (at 33)

that the sole purpose of the offer was to prove the "defect" element of his strict liability claim.\*

But Judge Carter quite properly excluded this evidence, explaining (J.A. 222):

"I don't think it is fair . . . because there hasn't been, so far as I know, any connection between the discontinuance of the design [as to placement of the fuel tank] and the fire. By putting that in evidence you give the impression that there is. I don't think that is fair."

The Court later observed that plaintiff had failed to establish the necessary foundation for the introduction of such proof, i.e., that the change in design was based upon a recognition that the existing design was defective (J.A. 378-79).

Appellant now baldly asserts, without any factual basis whatever, that G.M. changed its design in order to eliminate a known hazard, and that evidence of the subsequent change therefore constitutes acknowledgment and proof of a defect in the previous design. But such a contention totally disregards the most elementary concepts relating to the introduction of relevant evidence. When appellant attempted to offer this evidence at trial he had not even established that there was a manufacturing or design defect in Truck No. 2. Read in the light most favorable to plaintiff, the record discloses merely Professor Weinstein's unsupported opinion that placement of the fuel tank and filler neck assembly inside the cab was an unreasonably dangerous design. There was no showing whatever that this sup-

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\* In determining whether to admit such evidence, the lower Court put certain questions to Mr. Elwell of General Motors outside the presence of the jury. Mr. Elwell explained that both Ford and General Motors had moved the fuel tank out of the cab in 1973 (J.A. 427), seven years after Truck No. 2 was manufactured. Chrysler followed this change in 1974 (*Id.*).

posedly dangerous design was a contributing factor in the fire. Weinstein *assumed* (based upon theoretical possibilities of leaks in either the tank or the filler neck) that gasoline vapors were swirling around inside the cab. But he never specified the source of the fumes, adverting only to possibilities of punctures in the tank, rusting, etc.. He never eliminated the other numerous possible sources of gasoline vapors and was unable to explain why nobody in the cab detected the odor of gasoline. On this state of facts, the record was completely devoid of any cogent proof indicating that a defect in the design of the fuel tank or the filler neck was a proximate cause of the fire.

The subsequent offer of proof, therefore, to the effect that G.M. subsequently relocated the fuel tank outside the cab, constituted a devious and prejudicial trial gambit and a bootstrap argument of the most outrageous kind. Without establishing the proximate cause of the fire, and without attempting to negate other causes, plaintiff sought to convert a subsequent technological modification some seven years later into an admission of causative defect. Short of some valid factual indication that a defect in either the fuel tank or the filler neck assembly was a contributing factor in this fire, admission of such evidence would have been seriously prejudicial, and the lower Court was clearly correct in excluding it.

Appellant beclouds the issue by claiming that the "subsequent repairs" doctrine permits reception of this evidence. He conveniently overlooks his total failure to prove any relationship between the subsequent design change and the cause of the fire in the truck. Moreover, it is perfectly clear that the "subsequent repairs" doctrine is simply not applicable here.

In *Stephan v. Marlin Firearms Co.*, 353 F.2d 815 (2d Cir. 1965), *cert. denied*, 384 U.S. 959 (1966), this Court explained most persuasively why evidence of this character

should be excluded as proof of defect, regardless of the cause of action involved. Plaintiff in that case claimed that a design defect involving an exposed rifle hammer caused his injuries. The trial court excluded evidence that a different type of hammer had been manufactured by defendant subsequent to the sale of the rifle in question, ruling that such a subsequent technological development, by itself, was not relevant on the question of prior design defect. This Court affirmed, observing that inasmuch as the subsequent modification had been prompted by a specific prior injury, and was unrelated to any known safety problem, it could not be admitted as proof that the prior design was defective. There being no evidence that the change was a safety improvement, the matter was excludable as being completely irrelevant. This lack of connection between the subsequent design change and a pre-existing safety problem was the precise basis for Judge Carter's ruling (J.A. 222).

And the law of New Jersey is to the same effect as this Court's ruling in the *Stephan* case. In *Price v. Buckingham Manufacturing Co.*, 110 N.J. Super. 462, 266 A.2d 140 (1970), the New Jersey Court held that subsequent design modifications were inadmissible as proof of prior defective design in strict liability cases. In so holding, the New Jersey Court relied on Rule 51 of the New Jersey Rules of Evidence, which makes such evidence, even where it can be shown to have been remedial in nature, which was not the case here, to be inadmissible. Although appellant goes to great lengths seeking to undermine the *Price* decision, there is no question but that it constitutes the present law of New Jersey, which is that:

"[S]uch evidence should be equally inadmissible where the basis of the action is strict liability on the

theory of unsafe design in manufacture." 266 A.2d at 141.\*

Plaintiff argues (Brief at 44) that if faced with the issue today, the New Jersey Supreme Court would overrule *Price v. Buckingham* and follow the California decision of *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1975). But as Judge Carter observed at trial (J.A. 475-76), even if one were to assume that the New Jersey Supreme Court would be so inclined, an analysis of the *Ault* case reveals that the evidence offered in the instant case would remain inadmissible.

In *Ault*, the plaintiff alleged a specific design defect, claiming that the aluminum used in the gear box of his International Harvester "Scout" was unsuitable and that the gear box broke and caused the accident due to metal fatigue in the aluminum. Both sides agreed that after the accident the gear box was found to be broken. Three years after the accident, International Harvester changed over to iron in the manufacture of Scout gear boxes. The proof disclosed that Scouts equipped with the aluminum gear box were involved in accidents substantially similar to the one involved in the case. Moreover, there was testimony to the effect that inspection of Scout vehicles revealed that 60 per cent of those inspected revealed cracks in the aluminum gear box. The proof also showed that International Harvester had installed an iron gear box on some vehicles prior to the accident. It was clear that the change from aluminum to iron was directly connected to problems with the existing aluminum gear box; was thus an implicit admission of defect by International Harvester; and the

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\* Appellant's reliance on two other New Jersey cases is misplaced. Neither *Ryan v. Port of New York Authority*, 116 N.J. Super. 211, 281 A.2d 539 (1971), nor *Sabloff v. Yamaha Motor Co.*, 113 N.J. Super. 279, 273 A.2d 606 (1971) involved rulings on the admissibility of subsequent modifications on the issue of defect.

California court was clearly correct in admitting such evidence. In the present case, however, as Judge Carter observed (J.A. 222), there was absolutely no connection shown between the fire and the subsequent change in location of the gas tank years later. Under these circumstances, the Court below was obviously correct in excluding the evidence.

#### **POINT IV**

#### **The Trial Court Properly Excluded Color Photographs of Plaintiff's Burn Injuries**

During the course of plaintiff's direct examination, four color photographs of his burns (J.A. 556-59) were offered in evidence. These photographs were taken in the hospital the day following the fire by Mr. Hughes' physician. They depict, in vivid color, blisters, scars and other burn marks covering various portions of appellant's body. The pictures also reveal that plaintiff posed at several different camera angles in order to display specific portions of his body burned in the fire.

General Motors objected to the reception in evidence of these photographs on the ground that their minimal probative value was vastly outweighed by the prejudicial impact they would have if shown to the jury. Appellant now concedes (Brief at 46) that Judge Carter properly excluded these exhibits on the question of damages, which was the basis on which they were initially offered. It is claimed, however, that the subsequent offer of the photographs on the question of liability should have been permitted.

Appellant argues that the photographs reveal a "pattern of injury" supporting the theory that there were flames behind and to the left of him, thereby allegedly permitting an inference that the source of the fire was to his left and that the source of the vapors was the fuel tank or the filler

neck (Appellant's Brief at 47-49).<sup>\*</sup> Appellant says that this evidence was important, and its exclusion prejudicial, because there existed no other proof corroborating his theory, insofar as it related to the location of the flames. But such a claim is completely without foundation. Both Mr. Hughes and the treating physician, Dr. Rothfleisch, gave full and complete testimony concerning the areas of plaintiff's body which sustained burn damage. None of this testimony was contested by General Motors. The proffered photographs, therefore, merely served to confirm a fact not in issue.

Mr. Hughes gave specific testimony concerning which portions of his body received the heat or flames of the fire. He said he received burns on his upper left extremity and his left ear (J.A. 154). Dr. Rothfleisch corroborated this evidence by testifying that the burns were located on the ears, upper left arm, left shoulder, back and hip area (J.A. 171). The hospital records, which depicted in detail the portions of the body burned, were also in evidence. Thus there was ample evidence, without the photographs, relating to precisely where Mr. Hughes was burned.

The point stressed by appellant is that the burns on Mr. Hughes' left side indicate that the source of the fire was behind and to the left of plaintiff, in the general area of the filler neck (Appellant's Brief at 47). But a theory equally as plausible is that the left side injuries were attributable to appellant's exposing the left side of his body to the flames as he was delayed in exiting from the right-hand door. Admission of the photographs would have added nothing to the state of the record on this issue. Under these circumstances, the proffered photographs were cumulative at best, and their reception in evidence would have clearly resulted in prejudice to the defendant.

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<sup>\*</sup> This is obviously a makeweight argument to seek to make the photographs relevant on the liability question, when the real purpose of their offer was on the issue of damages, which offer had previously been denied.

Rule 403 of the Federal Rules of Evidence speaks on the propriety of excluding such evidence:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Admission of the photographs in evidence would have made no contribution whatever on the issue of the source of the fire, and the vivid composition and manner in which they were taken clearly overwhelmed their alleged evidentiary value.

## POINT V

### **The Trial Court Properly Denied Plaintiff's Attempt to Buttress His Case By Means Of Repetitive Rebuttal Testimony**

Professor Weinstein resumed the stand when General Motors rested. Under the guise of "rebuttal" evidence, counsel for appellant, in an obvious attempt to rescue his case by having the last word, sought to elicit a repetitive elaboration of the testimony previously delivered by Weinstein during the course of plaintiff's case in chief. It is now suggested here that the proposed rebuttal was designed to negate a surprise theory raised by the defense (Appellant's Brief at 51). Appellant asserts that it was General Motors who "first introduced" the possibility that the fire started in the engine and spread to the passenger compartment through the cab floor (*Id.*), and that he therefore should have been allowed to meet this claim with new expert opinion.

But the claim of surprise is without merit. GM's explanation of the manner in which the accident occurred,

offered through the testimony of Mr. Elwell, was fully anticipated by appellant and was discussed during plaintiff's case in chief. Counsel for plaintiff in his opening statement to the jury indicated his awareness that General Motors might show that the fire originated in the engine and spread to the cab (J.A. 112). The record clearly shows that during the course of plaintiff's direct case Professor Weinstein anticipated G.M.'s defense and rendered the same opinions, based upon the same assumed set of facts, as he was asked to do in rebuttal. No crucial event intervened to justify a repetition of Weinstein's views on the case.

During his direct examination, Weinstein acknowledged that conceivably the fire could have begun in the engine, spreading to the cab (J.A. 213). On cross examination, he was forced to concede:

"I believe that particles, ignited particles, could have come through from an engine fire into the cab, yes. If that's what you mean by fire coming in, yes, I would agree. A fire in the cab could have come *either from flame shooting through a hole or lighted particles or stuff burning through a couple of the holes*; yes, if that's what you mean by engine fire." (J.A. 241-42) (Emphasis added).

Weinstein conceded that prior to his testimony he was well aware that plaintiff's original theory had been that of a fire spreading from the engine to the cab (J.A. 297-99), and he completed his cross examination with the following statement:

"I don't know which fire started first. I'm reasonably certain there were two fires, one in the engine compartment, one in the cab, as I testified to yesterday.

Now, I'm not certain whether the fire in the engine compartment might have caused some particles, hot particles to come into the cab and ignite the flam-

mable vapors in the cab, or it was the reverse, whether the fire started in the cab, sent some vapors through the tiny holes and started a fire in the engine. *I'm not certain which one it was.*" (J.A. 310-11) (Emphasis added).

Plaintiff's counsel took advantage of his opportunity to rehabilitate Professor Weinstein on *redirect* examination, managing to have Weinstein repeat his new theory that there could have been *two* separate fires burning, without retreating from his theory that one of these fires was attributable to vapors in the cab (J.A. 487).

When the time came for the attempted rebuttal, counsel for plaintiff posed a series of questions designed to achieve a repetition of the same testimony previously rendered by Professor Weinstein. Typical examples of the questions objected to and sustained are as follows:

"Q. Professor Weinstein, you have heard the theory of the fire as has been suggested by General Motors in this case. Does this theory in any way alter the opinion that you expressed that there must have been gasoline vapor within the cab of the truck whose source was from the location of the gasoline tank or the filler neck and not from a leak in the engine compartment?" (J.A. 480)

\* \* \* \*

"Q. Is it still your opinion, Professor Weinstein, after listening to the testimony of Mr. Elwell, that there was gasoline, a flammable mixture of gasoline, vapor and air in the cab of the truck . . . which did not come from the engine compartment? (J.A. 480).

At this point Judge Carter observed that "I am not going to allow any redirect [rebuttal] which merely has Professor Weinstein stating what he has told us in his prior testimony." (J.A. 480). The Court's ruling was

obviously correct, since mere repetition of testimony is clearly not part of a rebuttal case.

Ignoring this ruling, counsel for Hughes persisted in attempting to rehash Weinstein's prior testimony. For example:

"Q. Is your theory, sir, that the gasoline vapors were inside the cab, how do you explain the circumstance that none of the witnesses testified here that they smelled the gasoline in the cab?

"Mr. Hagan: Objection, your Honor. That again was completely gone into.

The Court quite properly sustained this objection, for Weinstein had in fact already testified on this subject. As previously discussed *supra*, Weinstein testified that he believed that the passengers may have smelled the fumes but not been "aware" of them (J.A. 293-94).

Disregarding this wholly improper effort to introduce purely cumulative rebuttal testimony, appellant now claims that he was merely seeking "to negate defendant's theory of the emergence of the fire through slots in the cab's floor . . . which was first introduced as part of defendant's case." (Appellant's Brief at 51) (Emphasis added). This argument is grossly misleading, since the theory adverted to was directly confronted by Weinstein on plaintiff's direct case when he acknowledged that:

"A fire in the cab could have come *either from flame shooting through a hole or lighted particles or stuff burning through a couple of the holes. . . .*" (J.A. 241-42) (Emphasis added).

Appellant implies that Weinstein, in the above-quoted testimony, was *not* referring to the two holes in the floor of the cab. The implication is facetious and not worthy of consideration.

The holding in *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449 (2d Cir. 1975), cited by appellant, represents this Court's most recent decision on the question of the propriety of rebuttal testimony and supports Judge Carter's

exercise of his direction on this matter (515 F.2d at 457-58):

"While a trial judge has discretion to exclude rebuttal evidence which would have been admissible if offered as evidence in chief, see *French v. Hall*, 119 U.S. 152, 7 S. Ct. 170, 30 L.Ed. 375 (1886); *Casey v. Seas Shipping Co.*, 178 F.2d 360, 362 (2 Cir. 1949), such discretion should be tempered greatly *where the probative value of proffered evidence is potentially high* and where such evidence, though admissible on the case in chief, was unnecessary for the plaintiff to establish in its *prima facie* case." (Emphasis added)

In the present case, unlike *Weiss*, the proffered rebuttal testimony *had* been offered as evidence in chief. Counsel for plaintiff did not seek to elicit anything new from Weinstein on rebuttal. Merely cumulative evidence of this type is simply not permissible on rebuttal (515 F.2d at 458-59).

## POINT VI

### **There Was no Error in the Trial Court's Instructions to the Jury Pertaining to the Relationship Between Proof of Defective Design and Prevailing Custom and Usage in the Industry in Question**

Appellant argues that the trial court's instructions to the jury on the proper weight to be attributed to prevailing industry custom and usage in connection with a claim of defective design were erroneous. Appellant's entire argument on this point is seemingly directed at establishing the correctness of the proposition, which is not contested, that adherence to industry custom does not conclusively establish adherence to the required standard of care.

Surprisingly, however, appellant never once makes reference to anything in the trial court's *actual* instructions to the

jury that he believes to have been erroneous. The following was the instruction of the Court below on this point:

"In determining whether this product is defective you should also consider the generally accepted concepts and practices with respect to the design and installation of gasoline tanks prevailing for trucks of this nature in 1966. Thus, you may consider whether other manufacturers were placing gasoline tanks in the trucks in the same manner as General Motors when they built them in 1966." (J.A. 519)

Since appellant is silent on the matter, it is difficult to envision what might be deemed objectionable or contrary to the law in this instruction. There is no assertion that the customs of the industry are conclusive on the standard of care. Rather, the court succinctly and unambiguously instructed the jury that these matters were something they might "consider."

Reference to a portion of the colloquy that took place between Judge Carter and counsel for the appellant relative to this instruction reveals that Judge Carter had a clear understanding of the law:

"Mr. Elkind: I would ask your Honor to make the additional charge with respect to the fact that the other automobile manufacturers used a similar design only means for their consideration that if they so find that all the manufacturers used that design may have been using a defective design (sic)."

"The Court: I think my instruction is clear. *It is just a factor for them [the jury] to make a determination on, that is whether it was defective or not.*" (J.A. 535) (Emphasis added).\*

In contrast to the instruction offered by Judge Carter, a case relied on by appellant, *Shafer v. H. B. Thomas Co.*, 53 N.J. Super. 19, 146 A.2d 483 (1958), presents an example

\* This charge is in clear conformity with existing law. *Bexga v. Havir Manufacturing Co.*, 60 N.J. 402, 290 A.2d 281 (1972).

of a truly erroneous charge on this issue. The plaintiff in that case alleged that the substandard condition of defendant's swinging doors led to her injuries. In its charge, the trial court instructed the jury that negligence could only be predicated on deviation from then-existing construction standards in the industry. That charge, of course, was contrary to the law.

Appellant's position is completely contrary to the consistently applied standards in this Circuit in reviewing alleged errors in a trial court's instructions to a jury. It is fundamental that a judge is not required to deliver his instructions either in the specific words requested by the parties or in the exact language of any opinion. As long as the instructions clearly state the substance of the pertinent principles of law, they are sufficient. *United States v. Heyward-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *Halecki v. United States New York and New Jersey Sandy Hook Pilots Assoc.*, 282 F.2d 137 (2d Cir. 1960). In *Patch v. Stanley Works*, 448 F.2d 483, 490 (2d Cir. 1971), this Court rejected a defendant's multiple objections to the charge of the trial judge, finding that they were directed "only to the court's choice of words and of emphasis, not to subject content." Appellant's objections amount to no more, and should be similarly rejected.

## POINT VII

### **There Was a Total Failure of Proof on the Part of Plaintiff in this Case**

When all is said and done, the central fact of this case remains that plaintiff failed completely to prove the cause of the fire in this five-year old garbage truck, and sought to cover up such failure of proof through the use of speculation and unsupported hypotheses.

The basic facts of the case, however, which weighed heavily against the plaintiff, were as follows:

1. The truck had been engaged in extremely heavy use by the Weehawken Public Works Department for some five years prior to the fire, and had undergone substantial wear and tear, requiring numerous repairs. Oftentimes, such repairs were accomplished by using "reconditioned" or used parts, including a "reconditioned" starter at one point. Plaintiff made no attempt whatever to exclude faulty maintenance and normal deterioration as causes of the fire.
2. None of the men who worked on the truck ever recalled smelling gas fumes in the cab of the truck at any time prior to the day of the accident. Nor did any of them recall smelling gas fumes in the cab on the day of the fire. This cut heavily against plaintiff's unsubstantiated theory of a leaking gas tank or filler neck inside the cab.
3. The three passengers all described the start and spread of the fire in different ways, but Mr. Brennan, the driver, recalled first seeing the flames on the *outside* of the windshield, coming up through the hood.
4. After the fire in August of 1971, the truck sat in its burnt-out condition for some seven months until being scrapped in March of 1972, only two months before this action was commenced. The only investigator who examined the cab and engine compartment after the fire, Deputy Chief Lennon of the Weehawken Fire Department, stated that it was impossible to tell where or how the fire had started, and noted there was substantial damage in the engine compartment, to the point that certain of the metal parts had actually melted.
5. Plaintiff originally theorized an engine compartment fire, caused by an allegedly defective spark plug arrangement, which had then spread to the cab.

6. This theory was changed only weeks before trial, with the introduction of the claim that there had been leakage of gasoline fumes from either the gas tank or the filler neck assembly.

7. Professor Weinstein, the plaintiff's expert, had never seen the accident vehicle, was retained only shortly before trial, and his testimony consisted primarily of hypothetical assumptions and sheer speculation. His knowledge of the flammability characteristics of gasoline was so minimal as to be non-existent. He could not even identify the smell of gasoline when he was asked to do so in court. The final portion of his testimony consisted of speculation that there were *two* fires, one starting in the engine and one in the cab, and he conceded he did not know which one had started first, or how they were started.

Based on the above undisputed facts, it is not surprising, as plaintiff has conceded in his brief, that the jury found no liability on the part of G.M. None of the alleged evidentiary errors below, even if such claims were valid, would have affected in the slightest the great gap in proof existing in plaintiff's case.

It is respectfully submitted that the jury was eminently correct in finding in favor of General Motors in this case.

## CONCLUSION

For all of the foregoing reasons, defendant-appellee General Motors Corporation respectfully prays that an order be made and entered herein affirming in all respects the order and judgment of July 15, 1975, and awarding it the costs of this appeal.

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Respectfully submitted

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